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IN THE

Supreme Court of the United States

OCTOBER TERM, 1939.

No. 34

ESTATE OF CHARLES HENRY SANFORD, Deceased, Jennie R. Baird, Substitutionary Administratrix, c. t. a.,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE.

No. 37

ALMON G. RASQUIN, Collector of Internal Revenue of the United States for the First District of New York,

Petitioner,

v.

GEORGE ARENTS HUMPHREYS.

MOTION FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE* AND BRIEF.

BEVERLEY R. ROBINSON,
E. N. PERKINS,
WESTON VERNON, JR.,
15 Broad Street,
New York, N. Y.

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Motion.

Now come the undersigned, of 15 Broad Street, New York City, members of the Bar of this Court, and move for leave to file the annexed brief as *amicus curiae*, the consent of counsel for the petitioner and that of counsel for the

respondent in each case having been first obtained. The undersigned asks this leave as counsel for a taxpayer whose rights respecting a state of facts now existing will be affected by the final determination which shall be made in this cause, for which reason such taxpayer has a substantial interest in the result.

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BRIEF OF *AMICUS CURIAE.*

Statement.

The facts are fully presented in the briefs now on file. Generalized, the question for decision is whether a voluntary *inter vivos* transfer of property in trust is taxable as a transfer by gift under the applicable Revenue Act, where the donor retains power to change the beneficiaries but may not revest the property in himself or whether the tax is imposed later when the reserved power is relinquished.

In the *Sanford* case (No. 34) the petitioner's testator in 1913 created certain trusts, reserving in each the right to terminate or modify, termination to result in revesting the property in the settlor. By deed made in November, 1919, the power of revocation was relinquished, while the power to modify in other respects was retained. By deed made in August, 1924, the retained power to modify otherwise than by revocation, was relinquished. There was no gift tax law in effect at the time of the relinquishment of the power to revoke, but the gift tax of the Revenue Act of 1924 was in effect at the time the power to modify was relinquished. Since the reliquishment in 1924 of the power to modify was not regarded as subject to tax, no gift tax was paid.

The Commissioner claimed that the surrender in 1924 of the power to modify completed a transfer by gift and therefore was taxable. If the transfer by gift was complete in November, 1919, when the power to revoke was relinquished, at which time no gift tax was in force, the claim of the Commissioner in the *Sanford* case is untenable.

In the *Humphreys* case (No. 37) the respondent in 1934 transferred property to trustees reserving the income to himself for life and upon his death the corpus or income was to be disposed of in certain specified ways, depending upon which of the named remaindermen survived the donor. The trust was declared to be irrevocable and provided that it was not to be modified except that the settlor reserved the right to alter and amend the trust to the extent of substituting for the named beneficiaries other beneficiaries and to prescribe the terms and conditions on which such other beneficiaries should take. The trust also provided that the settlor should not by any alteration increase his beneficial interest in the trust estate.

The respondent reported the value of the remainder of the interests as taxable gifts but later claimed a refund on the ground that the transfer did not constitute a taxable gift, in view of the reserved power to change beneficiaries.

Argument.

POINT I.

A completed transfer by gift occurs when property is donated to a trust and the settlor retains no power to retake the property.

When property passes irrevocably, there is a complete transfer and there the tax is incurred because the gift tax is imposed on "the transfer * * * of property by gift" (Revenue Act of 1932, § 501; and *Cf.* Revenue Act of 1924, § 319). The transfer is complete because both the property and the use and enjoyment have passed wholly from the settlor and nothing remains in him. The reservation of a power in the settlor to change the beneficiaries, does not detract from the completeness of the transfer since the property and its use and enjoyment are forever out of the settlor. Upon a change of beneficiaries nothing passes from the settlor, for he has nothing which can be the subject of transfer.

Inasmuch as the interest of the beneficiary may be divested through exercise of the reserved power, we of course do not contend that the *benefaction* is beyond change. The gift tax, however, is an excise tax upon the *transfer* of property by gift and it is not necessary that the use and benefit of the property be beyond change if the transfer from the settlor is complete.

Until the issue presented in these cases was passed upon in *Hesslein* vs. *Hoey*, 91 F. (2d) 954 (C. C. A., 2d), certiorari denied 302 U. S. 756, only one donative transfer in trust was relieved from the gift tax, namely, where the grantor retained the power to revoke and thus to revest in himself title to, and enjoyment of, the corpus of the trust. This lone exception was early made by the Commissioner's Regulations. (Reg. 67, 1924 Ed., Art. 1), was recognized by Congress (Revenue Act of 1932, § 501(c)), and by this

Court in *Burnet* vs. *Guggenheim*, 288 U. S. 280. The basis for this exception is that a gift subject to the power to revoke is no gift at all but is one "that may never become consummate in any real or beneficial sense". *Burnet* vs. *Guggenheim, supra*, page 288.

The consistent administrative practice has been to apply the gift tax to a transfer in trust where the grantor retains the right to change the beneficiaries. (See the Government's brief, page 27). The Commissioner's Regulations have dealt only with the case in which the grantor has the power to *revoke* and have provided that the gift tax is applicable in such case when the power to revoke is terminated. (Reg. 67, 1924 ed., Art. 1; Reg. 79, 1933 ed., Art. 3; Reg. 79, 1936 ed., Art. 3). None of the Regulations have dealt with the power to change beneficiaries or indeed with the reservation of any other type of power except one to revoke. The positive nature of the administrative provisions dealing with reserved powers of revocation, when considered in the light of consistent administrative practice, makes the omission of any reference to powers of modification significant. We submit that the Treasury Regulations must be read as reflecting an administrative interpretation that only a power of revocation could withdraw a transfer from the operation of the tax. And this view is strengthened by the late Regulations, which specifically state that the tax is not imposed upon the receipt of property by the donee, nor is it measured or conditioned by the enrichment of the donee or by the fact that the donee cannot be identified at the time of the transfer.

These cases differ from *Burnet* vs. *Guggenheim, supra*. There the transfer was held incomplete until relinquishment of the unconditional power to revoke because the transfer was illusory as a reality so long as the settlor could take the property back. He had no more deprived himself of his property by the transfer than the depositor in a bank deprives himself of his money.

The court below decided this case as it did, and contrary to its better judgment (see 103 Fed. (2d) p. 83) because of *Hesslein* vs. *Hoey, supra,* where the court held there had been no completion of transfer because the right to change beneficiaries had been reserved. The reasoning in the *Hesslein* case is shot through with fallacy. The court thus applied a case where plainly the transfer was incomplete (*Burnet* vs. *Guggenheim*), to a case where plainly the transfer was complete. *Porter* vs. *Commissioner* (288 U. S. 436) also was misunderstood and misapplied in the *Hesslein* case, due to overlooking the fact that the decision in the *Porter* case did not turn on the completeness or incompleteness of a transfer, but on the aptness of the language of section 302 (d) to include the transferred property in the gross estate and the power of Congress under the Constitution to direct that particular inclusion.

In the *Hesslein* case, supra at p. 955, the court said:

> "• • •. This restriction [not to benefit self in changing disposition of the property through a reserved power] prevents the power reserved from being as absolute as that considered in Burnet *v.* Guggenheim, supra, but the power is nevertheless broad enough to enable the donor, subject only to the exception stated, to make a complete revision of all he has done. • • •."

The court likens the case to the *Guggenheim* case, overlooking the fact that in the *Hesslein* case the property had passed irrevocably to the trustee and the beneficiary, and the *transfer* (the thing taxed) was complete, and only the beneficiaries' interests (which are not what is taxed) remained incomplete in the sense that they could be changed. In the *Guggenheim* case, however, the transfer was plainly incomplete in that it was completely revocable. This fallacy stands out strikingly in the next paragraph of the court's opinion in the *Hesslein* case:

> "• • •. When the donor reserves the power to change the beneficiaries at will, whether the reserva-

tion be phrased* as a power to revoke or as a power to alter in any manner not beneficial to the donor or his estate, nothing has been done to give assurance that any part of the principal will ever be received by the named donees. * * *."

Thus, the court in the *Hesslein* case stresses as a ground of decision, the immaterial fact that since the beneficiaries can be changed, the benefaction remains imperfect, and ignores the decisive fact that the transfer, upon which the tax is levied, is perfect, since the property has passed from the donor irrevocably.

Further support for the view that Congress intended to impose the gift tax upon the completion of the transfer from the donor rather than upon the final determination of the donee is found in the statutory provision making the donor primarily liable for the tax (Revenue Act of 1924, Section 324; Revenue Act of 1932, Section 509(a)). Thus, the statute itself has chosen as the taxable event the transfer of property by the donor without regard to whether the donee's interest has vested beyond change.

POINT II.

The construction put on the statute by the Court below in the Sanford case defeats the intention of Congress.

The committee reports on the Revenue Bill of 1932 stated that the gift tax "will supplement both the estate tax and the income tax".** Prior to the imposition of a gift tax, tax-free transfers of property could be made with the result that the income therefrom was divided among

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* The difference between the power of one who can revoke and the power of one who, though able to alter otherwise, can not revoke, certainly is not one of phraseology. Such logical *leger-de-main* is not surprising where unlike things are treated as being alike.

** House Report No. 708, 72nd Congress, First Session, page 28; Senate Report No. 665, 72nd Congress, First Session, page 40.

a number of persons and taxes imposed by the higher brackets of the income tax were avoided. Obviously, the gift tax was intended to be imposed at the point where there is a shifting of taxable income from donor to donee and the law should be so construed. The construction put on the gift tax by the court below in the *Sanford* case, however, would permit a taxpayer to shift the enjoyment of the income to others, who would be subject to the income tax, and yet, if the donor retains the power to change the beneficiaries, avoid the gift tax.

The force of this consideration might be impaired if the gift tax would be a more effective supplement to the estate tax under the ruling of the *Sanford* case below than otherwise. Ever since the Revenue Act of 1924 the estate tax has reached all property transferred in trust by a decedent prior to death if the settlor retained the power to change the beneficiaries. (See Section 302(d), Revenue Act of 1924, as amended.) Thus, the estate tax is not strengthened by a decision that the gift tax does not apply where there is a transfer in trust subject to the power of change of beneficiaries.

Moreover, it is clear from the legislative history of the gift tax that Congress meant to exempt only those transfers where the power to *revoke* is retained and intended to tax all other transfers in trust. In Section 501(c) of the 1932 Act, it was expressly provided that the gift tax should not apply to any transfer where the donor retained, alone or jointly with another, power to revest title but that a tax should be incurred in such a case on the relinquishment of such a power. By expressly exempting from the tax only transfers subject to a power of revocation, Congress made it plain that transfers subject to other powers, such as the power to change beneficiaries, should be taxed.

After the 1932 Act was approved, this court decided *Burnet* vs. *Guggenheim, supra,* holding, under the 1924 Act, which contained no provision similar to Section 501(c), that a voluntary transfer in trust subject to a power of revoca-

tion is not a completed gift and the gift tax applies only when there is a relinquishment of the power of revocation. Thus, *Burnet* vs. *Guggenheim* showed that Section 501(c) of the 1932 Act was unnecessary in order to lay a tax on the relinquishment of a retained power of revocation.

When the Revenue Act of 1934 was under consideration Section 501(c) of the 1932 Act was repealed, not in order to change the law, but because the section was deemed unnecessary. The Congressional reports make this perfectly clear, saying (House Report No. 704, 73rd Congress, Second Session, page 40; Senate Report No. 558, 73rd Congress, Second Session, page 50):

> "* * * the principle expressed in that section is now a fundamental part of the law by virtue of the Supreme Court decision in the Guggenheim case."

Judge Hand, in his dissent in the *Hesslein* case, recognized this, for he stated:

> "Consequently as a matter of Congressional interpretation subdivision (b) [laying the tax] is to be read as if subdivision (c) [expressly excepting transfers subject to power of revocation] was still a part of the act. * * *."

It seems clear, therefore, that Congress intended to exempt from the gift tax only those transfers in trust where the settlor retains the power to revoke and plainly indicated an intention to tax all other transfers in trust.

Consequently, we submit that the decision of the court below in the *Sanford* case should be reversed and that the decision in the *Humphreys* case should be ~~affirmed~~ reversed.

Respectfully submitted,

BEVERLEY R. ROBINSON,
E. N. PERKINS,
WESTON VERNON, JR.,
15 Broad Street,
New York, N. Y.